

Baseball Spectators' Assumption of Risk: Is It "Fair" or "Foul"?

Gil Fried

Robin Ammon Jr.

Follow this and additional works at: <http://scholarship.law.marquette.edu/sportslaw>



Part of the [Entertainment and Sports Law Commons](#)

Repository Citation

Gil Fried and Robin Ammon Jr., *Baseball Spectators' Assumption of Risk: Is It "Fair" or "Foul"?*, 13 Marq. Sports L. Rev. 39 (2002)
Available at: <http://scholarship.law.marquette.edu/sportslaw/vol13/iss1/4>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

BASEBALL SPECTATORS' ASSUMPTION OF RISK: IS IT "FAIR" OR "FOUL"?

GIL FRIED

ROBIN AMMON JR.¹

I. INTRODUCTION

"Buy me some peanuts and cracker jacks" is a well-known phrase from the popular baseball tune "Take Me Out To The Old Ballgame." This well-liked verse has been sung countless times since the song was introduced in 1909. Other fashionable elements of baseball such as the sound of the bat, the smell of popcorn and hotdogs, the taste of cold beer, and the sight of a long home run are equally as identifiable as the well-known tune. In addition to these popular memories, baseball also has unique risks, specifically those caused by foul balls. There exists a wealth of case law and articles covering this well-established area of law.² However, recent trends in technology and viewing habits might require a change in the typical application of case law to foul ball cases.

This article will briefly focus on the history of foul ball litigation in baseball and the various court decisions that laid the foundation for the assumption of risk doctrine. The article then examines the doctrine of assumption of risk as it has evolved and what risks are inherent in the sport of baseball, open and/or notorious, or outside the scope of the game of baseball. Finally, the reality presented by new stadiums built within the past decade and new marketing techniques will be discussed to see if the standard regarding assumption of risk needs to be altered or modified.

1. Gil Fried is an Associate Professor at the University of New Haven, School of Business, in the Management of Sports Industries Department. Robin Ammon Jr. is an Associate Professor in the Sport Management Program at Slippery Rock University.

2. GIL FRIED, *SAFE AT FIRST* (Herb Appenzeller ed., 1999).

II. BASEBALL'S "FOUL" HISTORY

A. *Early Days Till 1950*

The game of baseball can trace its origins to before the Civil War.³ The first professional team, the Cincinnati Red Stockings, along with seven other teams formed the National League in 1876.⁴ A quarter of a century later in 1901, eight other teams joined to form the American League.⁵ By 1903, these sixteen teams constituted the general make-up of major league baseball for the next fifty years.⁶

After the formation of the two leagues, baseball rapidly grew in popularity and prestige until it became known as the "National Pastime."⁷ It did not take long, however, for litigation resulting from the risks associated with baseball to arrive at the courthouse door. Almost from the inception of the two leagues the courts have stated:

It is knowledge common to all that in these games hard balls are thrown and batted with great swiftness; that they are liable to be muffed or batted or thrown outside the lines of the diamond, and visitors standing in position that may be reached by such balls have voluntarily placed themselves there with knowledge of the situation, and may be held to assume the risk.⁸

Early baseball litigation was comprised of spectators being hit by foul balls and thrown bats. The injured fans sued teams and facility owners alleging negligence. The plaintiffs often sued because they perceived that their seats were not protected or screened properly. In fact, from a historical perspective, baseball has helped to define negligence as it pertains to sport.⁹ In the 1913 case *Crane v. Kansas City Baseball & Exhibition Co.*,¹⁰ the court held that the plaintiff was at fault for contributing to his own negligence.¹¹

3. Double Play Records, *The Spread*, at <http://www.doubleplay.com/baseball/spread.htm> (last visited Sept. 29, 2002).

4. *Id.*

5. *Id.*

6. *Id.*

7. Double Play Records, *The 1900's*, at <http://www.doubleplay.com/baseball/1900s.htm> (last visited Sept. 29, 2002).

8. *Blakeley v. White Star Line*, 118 N.W. 482, 483 (Mich. 1908).

9. Joshua E. Kastenberg, *A Three Dimensional Model of Stadium Owner Liability in Spectator Injury Cases*, 7 MARQ. SPORTS L. J., 187, 189 (1996).

10. 153 S.W. 1076 (Mo. Ct. App. 1913).

11. *Id.* at 1078.

Since spectators are paying patrons of the game of baseball, facility owners are held responsible to exercise a reasonable duty of care, but they are not an insurer of the safety of their spectators.¹² However, the *Crane* court felt that if a fan is given the option of choosing a seat inside the facility, and the fan picks a seat located in a dangerous area, the fan contributed to his own negligence.¹³

Also in 1913, the Supreme Court of Minnesota rendered a decision pertaining to baseball in *Wells v. Minneapolis Baseball & Athletic Ass'n*.¹⁴ The allegations of negligence presented in this case also dealt with the duty facility managers owed spectators and the type of seating offered to them.¹⁵ The court stated that in a facility where the public is invited to watch a sporting event, such as a baseball game, facility management is required to provide reasonable care and foreseeability to protect the spectators from danger.¹⁶ The court relied upon the *Crane* decision to explain that when spectators know, understand, and appreciate the risks from broken bats or foul balls, they cannot hold the facility management accountable for any injuries that may occur.¹⁷ Thus, knowledgeable spectators who choose to sit in the open as opposed to sitting in a seat behind the screened area contribute to their own risk.¹⁸ However, the *Wells* court pointed out that not everyone, including women and others, are privy to this requisite knowledge.¹⁹

Not every initial case ended in a defense verdict. *Edling v. Kansas City Baseball & Exhibition Co.*²⁰ was similar to the previously mentioned cases in that it involved a plaintiff being struck by a foul ball.²¹ However, in *Edling* the ball passed through a hole in the protective netting, breaking the plaintiff's nose.²² Both the lower court and the Missouri Court of Appeals found for the plaintiff and awarded damages.²³ The court of appeals agreed with *Crane* and stated that spectators assume certain "natural" risks when attending professional baseball games, such as being struck by foul balls.²⁴ The court went on to say that facility owners are not required by law to protect their

12. *Id.* at 1077.

13. *Id.* at 1078.

14. 142 N.W. 706 (Minn. 1913).

15. *Id.* at 707.

16. *Id.* at 708 (citing *Crane*, 153 S.W. 1076).

17. *Id.*

18. *Id.*

19. *Wells*, 142 N.W. at 708.

20. 168 S.W. 908 (Mo. Ct. App. 1914).

21. *Id.* at 909.

22. *Id.*

23. *Id.* at 908, 911.

24. *Id.* at 909.

spectators from being hit by foul balls.²⁵ However, when the owners provide seats protected by screening or netting they are bound to exercise reasonable care to insure the protection is properly maintained.²⁶ The court held that "where one person owes a duty to another, the person for whose protection the duty exists cannot be held to have assumed risks of injury created solely by a negligent breach of such duty."²⁷

As the years went by, the number of foul ball injuries that ended up in the courtroom grew. In 1935, the Supreme Court of California used *Edling* to affirm a lower court's ruling for the defense in *Quinn v. Recreation Park Ass'n*.²⁸ The appellant, a fourteen-year-old female, had been sitting in an unprotected seat watching a San Francisco-Pittsburgh baseball contest when she was struck by a foul ball.²⁹ The appellant contended that an usher temporarily seated her in the open area of the stadium after she had specifically requested a seat behind the protective screening.³⁰ The California Supreme Court, citing *Edling*, held that baseball spectators assume the risks of being hit by foul balls and that the facility management is not required to insure the spectators against such injuries.³¹ The management is only required to use reasonable care to insure these injuries do not take place, and screening the entire stadium is not an option, since many spectators wish to sit in seats where their view is not obstructed by a screen.³² The court found that by sitting in an unprotected seat, even temporarily, the appellant assumed the risks of being struck by a foul ball.³³

In 1942, the Supreme Court of Missouri heard the case of *Hudson v. Kansas City Baseball Club, Inc.*³⁴ When purchasing his ticket, the plaintiff requested to be seated in the "best reserved seat," intending to sit in a section protected by the stadium's wire netting.³⁵ However, when he was escorted to his seat, it was not behind the protected screening and subsequently "he was struck and seriously injured by a foul ball."³⁶ The court, using *Crane* and

25. *Edling*, 168 S.W. at 909.

26. *Id.*

27. *Id.* at 910.

28. 46 P.2d 144, 146 (Cal. 1935).

29. *Id.* at 145.

30. *Id.* at 146.

31. *Id.* (citing *Edling*, 168 S.W. 908).

32. *Id.*

33. *Quinn*, 46 P.2d at 146.

34. 164 S.W.2d 318 (Mo. 1942).

35. *Id.* at 319

36. *Id.*

Edling as precedent, held that the plaintiff could not assume that because the ticket was in the reserved seating area, it was going to be behind the wire netting.³⁷ Thus, at some point during the game, since the plaintiff had previously attended games in the stadium, he should have noticed he was not sitting behind the wire screening.³⁸ His election to remain in an unprotected seat was voluntary and he assumed all risks as a result of his decision.³⁹

B. 1950s – Mid-1980s

During the last half of the twentieth century, baseball witnessed many changes.⁴⁰ The league developed with the Boston Braves moving to Milwaukee and the St. Louis Browns moving to Baltimore, becoming the Orioles.⁴¹ These changes were the first major moves since the 1900s. In addition, African-American players were allowed to play in the major leagues and baseball moved to a truly national game with the introduction of several teams on the west coast.⁴² Finally, the season was extended to 162 games and many of the games were televised.⁴³ While most of these changes occurred to better the sport, other changes took place at the various stadiums to ensure better safety for spectators who attended the games. During this same period, a change in judicial attitude was seen, with several court decisions favoring plaintiffs. Some lawyers involved in baseball negligence cases believed the subtle change toward plaintiff judgments occurred due to the shift in some states from assumption of risk to comparative negligence as a defense.⁴⁴

For example, the Supreme Court of Pennsylvania found for an injured female spectator in *Jones v. Three Rivers Management Corp.*⁴⁵ The appellant in this case was struck in the eye with a foul ball before the opening game at Three Rivers Stadium while she was standing on a concourse during batting practice.⁴⁶ Using *Ratcliff v. San Diego Baseball Club of the Pacific Coast League*⁴⁷ as a precedent, the state supreme court ruled that if “the occurrence causing [the] injury [is] not a ‘common, frequent and expected’ part of the

37. *Id.* at 323-24.

38. *Id.* at 324.

39. *Hudson*, 164 S.W.2d at 324-25.

40. Double Play Records, *supra* note 7.

41. *Id.*

42. *Id.*

43. *Id.*

44. Lynne Reaves, *Eye On The Ball: Injured Spectator Wins*, 69 A.B.A. J. 1616 (1983).

45. 394 A.2d 546 (Pa. 1978).

46. *Id.* at 548.

47. 81 P.2d 625 (Cal. Dist. Ct. App. 1938).

game of baseball”⁴⁸ there is nothing to prevent the defendant from being found negligent.⁴⁹ Thus, according to the holdings of the Pennsylvania Supreme Court, previously decided “‘no-duty’ rules [sic] apply only to risks which are ‘common, frequent and expected’” and do not affect a sport facility’s duty to “protect patrons from foreseeably dangerous conditions not inherent”⁵⁰ to the baseball game.

For the defense to use assumption of risk, it is required to show that the plaintiff knew of the danger caused by the defendant’s negligence and that the plaintiff accepted the risks caused by the danger.⁵¹ A perplexing question arises when attempting to ascertain who is at fault when an invitee becomes injured while his attention is diverted from the dangers on the field by the “eye-catching” advertisements and promotional “gimmicks” created by the defendant.

Most court decisions from the first half of the twentieth century agreed that the owner of a baseball field is not an insurer of a spectator’s safety. Rather, like any other owner or occupier of land, owners only need to exercise a duty of reasonable care to prevent injury to those who come to watch the games played on their fields. Court decisions during the third quarter of the twentieth century adopted several standards when defining the duty of the ballpark owner. Some jurisdictions stated that facility owners have a duty to provide a screened section for those spectators who wish to sit there.⁵² Other courts established that ballpark owners must only provide enough screened seats for those spectators who desire such protection.⁵³ However, most courts adopted a “two-prong” test when defining the duty of a stadium owner to provide protected seats for its patrons.⁵⁴ The first prong states that the facility owner must protect the most dangerous section of the ballpark, which usually is behind home plate.⁵⁵ The second prong states that the ballpark owner must simply screen enough seats to reasonably fulfill requests from spectators on an ordinary occasion.⁵⁶

In *Akins v. Glens Falls City School District*,⁵⁷ the plaintiff was watching a

48. *Jones*, 394 A.2d at 551 (quoting *Ratcliff*, 81 P.2d 625).

49. *Id.*

50. *Id.* (quoting *Goade v. Benevolent & Protective Order of Elks*, 213 Cal.2d 183 (1963)).

51. *Id.* at 552-53.

52. *Crane*, 153 S.W. at 1076.

53. *Quinn*, 46 P.2d at 146.

54. *Akins v. Glens Falls City Sch. Dist.*, 424 N.E.2d 531, 533 (N.Y. 1981).

55. *Id.*

56. *Id.*

57. 424 N.E.2d 531.

high school baseball game while standing behind the third base line "ten to fifteen feet from the [edge] of the backstop" ⁵⁸ During the game, Akins was hit in the eye by a foul ball, causing serious and permanent injury. ⁵⁹ The court held that the facility owner did not have a duty to screen the entire field. ⁶⁰ The owner had furnished adequate screening for the area of the field behind home plate, where the danger of being struck by a foul ball was the greatest. ⁶¹ In addition, the plaintiff failed to show that the number of seats behind the backstop was insufficient for the spectators who desired such screened seating during the course of the game. ⁶² Thus, the owner fulfilled the "two-prong" duty of care imposed by law and was not negligent. ⁶³

In 1984, *Davidoff v. Metropolitan Baseball Club, Inc.* ⁶⁴ was brought before the New York Court of Appeals, and the court based its ruling on the *Akins* case. ⁶⁵ The case involved a female plaintiff who was struck in the head by a baseball while sitting behind first base in a box seat. ⁶⁶ The court stated that the plaintiff could not recover for damages from an injury which occurred while she was seated in an unprotected, unscreened area when it was undisputed that there were vacant seats in the protected screened section. ⁶⁷ The court agreed that while many viewers choose to sit in seats unobstructed by screening, the plaintiff was unable to show why the policies established in *Akins* should be changed. ⁶⁸

As previously mentioned, the 1950s-1980s witnessed most foul ball cases being found in favor of the defense. However, numerous baseball injury cases have produced unknown results, since they are often resolved through summary judgment or demurrers that eliminate the opportunity for many published opinions that reinforce the concepts and concerns highlighted above.

C. Mid-1980s – Present Day

Though many changes have occurred in the *game* of baseball, the sport is still looked upon as one of the greatest pastimes in the history of sport. Due to

58. *Id.* at 532.

59. *Id.*

60. *Id.* at 533-34.

61. *Id.* at 534.

62. *Akins*, 424 N.E.2d at 534.

63. *See id.*

64. 463 N.E.2d 1219 (N.Y. 1984).

65. *Id.* at 1220.

66. *Id.*

67. *Id.*

68. *Id.*

baseball's protected status as a result of its partial antitrust exemption, many facets of the game have changed little in the past 100 years. In other ways, today's game has changed dramatically with the threat of work stoppages, high salaries, newly constructed stadiums, large television rights fees, and an ever-changing strike zone. The one common element is the cases that still end up in the courtroom.

Court decisions during this period initially continued as they had in the past, in favor of the defendant. In *Swagger v. City of Crystal*,⁶⁹ a female plaintiff alleged that the number of screened seats were not sufficient to accommodate her at a softball game.⁷⁰ The Minnesota Appellate Court stated that a field owner's "duty to protect its patrons from thrown or batted balls ceases when it offers the spectators a choice between screened-in or open seats unless some reason exists requiring a fuller explanation of the perils involved."⁷¹

In *Dent v. Texas Rangers, Ltd.*,⁷² the female appellant was injured by a foul ball at Ranger Stadium in Arlington, Texas.⁷³ Dent argued that the lower court had made two mistakes when granting summary judgment.⁷⁴ The first claim alleged error in the holding that since the Rangers had provided screened seats to their spectators, they owed no duty to the appellant.⁷⁵ Dent then claimed that the Rangers had an additional duty to inform their spectators that screened seats were available.⁷⁶ The court of appeals relied upon two previous cases in which the plaintiffs had been injured by foul balls to affirm summary judgment for the appellee: *McNiel v. Fort Worth Baseball Club*⁷⁷ and *Friedman v. Houston Sports Ass'n*.⁷⁸ In quoting *McNiel*, the court stated:

"So far as regards the danger to a spectator of being struck and injured by a ball batted into the stands, a circumstance which is commonly incident to the inherent nature of the game, the club is held to have discharged its full duty when it has provided adequately screened seats

69. 379 N.W.2d 183 (Minn. Ct. App. 1985).

70. *Id.* at 185; see also James C. Kozlowski, *Spectators Assume Obvious Risks in Unprotected Areas of Ballfield*, NRPA L. REV. para. 7 (April 1997), <http://classweb.gmu.edu/jkozlows/p&r497.htm> (last visited Sept. 29, 2002).

71. *Swagger*, 379 N.W.2d at 185-86 (quoting *Aldes v. St. Paul Baseball Club, Inc.*, 88 N.W.2d 94, 96 (Minn. 1958)).

72. 764 S.W.2d 345 (Tex. App. 1989).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. 268 S.W.2d 244 (Tex. Civ. App. 1954).

78. 731 S.W.2d 572 (Tex. App. 1987).

in stands in which the patron may sit if he so desires."⁷⁹

The Texas Court of Appeals went on to quote *Friedman*:

"These cases do not eliminate the stadium owner's duty to exercise reasonable care under the circumstances to protect patrons against injury. However, they define that duty so that once the stadium owner has provided 'adequately screened seats' for *all* those desiring them, the stadium owner has fulfilled its duty of care as a matter of law."⁸⁰

The *Dent* court agreed with both *McNiel* and *Friedman* that a stadium owner has a duty to provide an adequate number of screened seats for spectators who wish those seats, but the owner does not have a duty to *inform* those spectators of the screened seats.⁸¹

In *Coronel v. Chicago White Sox, Ltd.*,⁸² the plaintiff was struck in the face by a line drive foul ball as she looked down to get some popcorn.⁸³ The plaintiff argued the White Sox failed to protect her from, or warn her about, the possible dangers from foul balls.⁸⁴ The Circuit Court of Cook County awarded summary judgment and Coronel appealed, arguing that there existed questions of fact precluding summary judgment.⁸⁵ The defendants argued that they did not owe a duty to protect spectators from foul balls, but the appellate court disagreed and stated that landowners owe a duty of reasonable care to invitees on their premises.⁸⁶ The Illinois Appellate Court stated that this concept was established ninety years earlier in the *Wells* case and reinforced over twenty years earlier in the *Akins* case.⁸⁷ The White Sox testified that they had no duty to warn the plaintiff about foul balls because "a land owner owes no duty" for "'open and obvious'" dangers.⁸⁸ The appellate court concluded that while other jurisdictions support the application of a limited duty rule, it was not the law in Illinois.⁸⁹ The court quoted the *Maytnier v. Rush*⁹⁰ case, which concluded that "[i]t does not necessarily follow, however, that once an owner of a ballpark has provided an adequate fenced-in area for the most

79. *Dent*, 764 S.W.2d at 346 (quoting *McNiel*, 268 S.W.2d at 246).

80. *Id.* (quoting *Friedman*, 731 S.W.2d at 574).

81. *Dent*, 764 S.W.2d at 346.

82. No. 1-90-0091, 1991 Ill. App. LEXIS 1949 (1st Dist. Nov. 19, 1991).

83. *Id.* at *1.

84. *Id.* at *1-2.

85. *Id.* at *2.

86. *Id.* at *3.

87. *Coronel*, 1991 Ill. App. LEXIS 1949, at *4.

88. *Id.* at *6.

89. *Id.* at *6-7.

90. 225 N.E.2d 83 (Ill. App. Ct. 1967).

dangerous part of the grandstand he has thereafter exculpated himself from further liability”⁹¹

In a similar decision to *Coronel*, the court found for the plaintiff in *Yates v. Chicago National League Ball Club, Inc.*⁹² Yates alleged that the Chicago Cubs were negligent in providing adequate screening for seats behind home plate, as well as failure to warn about the potential dangers of sitting behind home plate.⁹³ The court concluded that the stadium owner owes a duty that is satisfied if screened protection is provided to those who request it.⁹⁴ The court also held that the screening provided must not only be adequate in design, but there must be enough of it to satisfy all those who are concerned about their safety.⁹⁵ The jury found that the owner had breached his duty to provide adequate screening and found the team liable for \$67,500.⁹⁶

The two Illinois decisions were rendered obsolete by a statute passed the year after the decisions were made.⁹⁷ In 1992, the Illinois legislature put into effect a law regarding “foul ball” injuries.⁹⁸ The Baseball Facility Liability Act was enacted to protect public or privately owned ballparks in Illinois from lawsuits resulting from unintentional injuries caused by foul balls.⁹⁹ Not everyone was in favor of the new legislation; obviously, some plaintiff attorneys were strongly opposed. They believed “the new law . . . replace[d] the doctrines of reasonable care and comparative negligence with the doctrine of assumption of risk.”¹⁰⁰ The 1992 legislation stated that the only time a plaintiff may sue is when he is either sitting behind a protective screen when injured, or if a facility employee or owner injures the plaintiff by willful or wanton conduct.¹⁰¹ Also, the law took the question of fact away from the jury by determining no liability as a matter of law.¹⁰² Finally, there was some concern that the people who really benefited from this law were the defendants

91. *Coronel*, 1991 Ill. App. LEXIS 1949, at *7 (quoting *Maytnier*, 225 N.E.2d at 87).

92. 595 N.E.2d 570 (Ill. App. Ct. 1992).

93. *Id.* at 573.

94. *Id.* at 578 (citing *Maytnier*, 225 N.E.2d at 87 (quoting *Brisson v. Minn. Baseball & Athletic Ass’n*, 240 N.W. 903, 904 (Minn. 1932))).

95. *Id.*

96. *Id.* at 577.

97. Baseball Facility Liability Act, 745 ILL. COMP. STAT. ANN. 38/49 (West 2002).

98. *Id.* § 38/10.

99. Robert A. Clifford, *P.I. Lawyer Calls Foul Ball on Baseball Act*, CHI. LAW., Apr. 1993, at paras. 1-2, available at <http://cliffordlaw.com/media/articles/1053.html> (last visited Sept. 29, 2002).

100. *Id.* at para. 11.

101. Baseball Facility Liability Act § 38/10.

102. Clifford, *supra* note 99, at para. 13.

in the tort community (*i.e.*, the owners and the insurance companies).¹⁰³ Thus, the teams pay lower insurance premiums and the club saves money, which can be used towards player salaries.¹⁰⁴ This benefits the players and the owners, but negates their accountability for their own negligence.¹⁰⁵

Recently, the Appellate Court of Illinois affirmed a trial court decision that found the Illinois Baseball Liability Act constitutional.¹⁰⁶ James Jasper was injured "by a foul ball at a Chicago Cubs baseball game."¹⁰⁷ He attempted to show that the legislation was unconstitutional under both the Illinois and U.S. Constitutions.¹⁰⁸ The appellate court judge ruled, however, that the law did not give special benefits to one class or group and it was related to a legitimate state interest.¹⁰⁹ The judge maintained that "[t]he Baseball Act encourages use of parks for recreational activity in a way that is not arbitrary, capricious or unreasonable."¹¹⁰ While Illinois law is now fairly settled, other states still are grappling with how to handle foul ball cases:

In 1993, an Arizona court stated that the risk of being struck by a foul ball at a baseball game is generally considered to be "open and obvious," and, therefore, generally limits the liability placed upon the landowner.¹¹¹ The court stated that a landowner is not generally found to be negligent for injuries to invitees from actions recognized as "open and obvious," nor is the landowner liable for injuries caused by risks known to the invitee.¹¹² In *Bellezzo v. Arizona*,¹¹³ the court stated:

A similar observation applies to the failure of an owner of a baseball park to post a sign warning fans that no screen protects them from the open and obvious risk of foul balls if they sit in an unscreened area. The lack of a screen is as obvious as the fact that the Grand Canyon is a chasm, and the danger that a spectator hit by a foul ball may be

103. *Id.* at paras. 16-17.

104. *Id.* at para. 16.

105. *Id.*

106. *Jasper v. Chi. Nat'l League Ball Club, Inc.*, 722 N.E.2d 731 (Ill. App. Ct. 1999); *see also Illinois Baseball Facility Liability Act is Not Unconstitutional Special Legislation, Nor Does it Deny Equal Protection to Patron Injured by Foul Ball During Chicago Cubs Game, State Appellate Court Rules*, ENT. L. REP., May 2000, at Vol. 21, No. 12.

107. *Jasper*, 722 N.E.2d at 733.

108. *Id.*

109. *Id.* at 736.

110. *Id.* at 734-35 (citing *Maloney v. Elmhurst Park Dist.*, 265 N.E.2d 654 (Ill. 1970)); *see also Illinois Baseball Facility Liability Act, supra* note 106, at para. 6.

111. *Bellezzo v. Arizona*, 851 P.2d 847, 851 (Ariz. Ct. App. 1993).

112. *Id.* at 850 (citing *Markowitz v. Ariz. Parks Bd.*, 706 P.2d 364, 367 (Ariz. 1985)).

113. 851 P.2d 847.

injured is as evident as the likelihood that one who falls into the Grand Canyon may be hurt.¹¹⁴

In *Gunther v. Charlotte Baseball*,¹¹⁵ the plaintiff was on a business trip to Charlotte, North Carolina.¹¹⁶ While there, she accepted a friend's invitation to attend a baseball game.¹¹⁷ The plaintiff contended "that she had never . . . attended a baseball game, although she acknowledged that she had watched the sport on television 'in passing.'"¹¹⁸ The plaintiff "occupied a seat in the second row of bleachers (one row away from the field) behind the third-base dugout . . ."¹¹⁹ As the game progressed, a "ball was fouled back onto the press box, shattering the glass window and causing [the plaintiff] to divert her attention momentarily to the press box area, over her right shoulder."¹²⁰ Immediately "as she turned back to watch the game, a second foul ball struck Gunther squarely in the face, causing serious injuries to her face and to the bony orbit encasing her eye."¹²¹ Gunther sued, alleging "negligence in the design and operation of the park."¹²² The U.S. District Court granted the defendant's summary judgment based on several previous court decisions. Quoting *Quinn*, the court stated, "[o]ne of the natural risks assumed by spectators attending professional games is that of being struck by batted or thrown balls; . . . the management is not required, nor does it undertake to insure patrons against injury from such source . . ."¹²³

The court continued with remarks from prior decisions, including *Brisson v. Minneapolis Baseball & Athletic Ass'n*,¹²⁴ stating that, "[it] is our opinion that the plaintiff, notwithstanding his alleged limited experience, must be held to have assumed the risk of the hazards to which he was exposed."¹²⁵ Finally, the plaintiff argued that the press box window had been shattered on more than one occasion during previous games, which provided the stadium owner with foreseeable knowledge of the distraction.¹²⁶ Therefore, the

114. *Id.* at 852.

115. 854 F. Supp. 424 (D.S.C. 1994).

116. *Id.* at 426.

117. *Id.* at 425.

118. *Id.* at 426.

119. *Id.*

120. *Gunther*, 854 F. Supp. at 426.

121. *Id.*

122. *Id.* at 425.

123. *Id.* at 427 (quoting *Quinn*, 46 P.2d. at 146).

124. 240 N.W. 903 (Minn. 1932).

125. *Gunther*, 854 F. Supp. at 428 (quoting *Brisson*, 240 N.W. at 904).

126. *Id.* at 426, 429.

plaintiff stated that the facility owner was liable because "spectators may be injured when their attention is diverted by [a] foreseeable distraction[.]"¹²⁷ However, the U.S. District Court maintained that

baseball games, like other sporting events, routinely involve distractions. For example, soft drink and peanut vendors, giant team mascots, raffles for prizes, and high tech scoreboards all compete for the attention of patrons who attend athletic events. Fans who attend games expect, and apparently enjoy, these distractions. Such distractions are at least as foreseeable to the spectators as they are to the owners of the premises.¹²⁸

In 1995, the Utah Supreme Court noted how different jurisdictions explored the standard of reasonable care, which assisted in the development of what is known as the "majority rule," which was similar to the "two-prong" test in *Akins*.¹²⁹ *Lawson v. Salt Lake Trappers, Inc.*¹³⁰ required facility owners to screen the most dangerous sections of the ballpark, normally behind home plate, and provide screened seats for the number of spectators who may request seating for an ordinary game.¹³¹ However, similar to findings in *Edling, Quinn*, and *Akins*, the "majority rule" test also realizes the traditions of baseball and that some patrons do not wish to have their view obstructed by a screen; therefore, the court did not require the stadium owners to screen the entire ballpark.¹³²

IV. DISTRACTION THEORY

An earlier case, *City of Milton v. Broxson*,¹³³ brought up an interesting question pertaining to "foul ball" injuries.¹³⁴ This case was based on the "distraction theory."¹³⁵ The plaintiff was a spectator who, while watching one game, was injured by a poor throw from a player warming up for the next scheduled game.¹³⁶ When dangers are considered to be "open and obvious," facility owners have usually not been found liable for any injuries caused by

127. *Id.* at 429.

128. *Id.* at 429-30.

129. *Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013, 1015 (Utah 1995).

130. 901 P.2d 1013.

131. *Id.* at 1015; *see also* Kozlowski, *supra* note 70, at paras. 4-6.

132. *Lawson*, 901 P.2d at 1015.

133. 514 So. 2d 1116 (Fla. Dist. Ct. App. 1987).

134. *See generally id.*

135. *Id.* at 1118-19.

136. *Id.* at 1117.

poorly thrown balls, broken bats, or foul balls.¹³⁷ These dangers have been found to be known or obvious, and a reasonable person looking out for his own safety would be able to avoid the risk of injury.¹³⁸ The “distraction theory” states that for the facility owner to be liable, the owner must have created the distraction, and that the distraction “not be self-induced by the plaintiff’s [lack of attention] to [the] obvious risk[s].”¹³⁹

One of the more recent cases, *Lowe v. California League of Professional Baseball*,¹⁴⁰ involved the claim of a “distraction” similar to *Gunther*, although with contrary results.¹⁴¹ In 1994, during a minor league baseball game at the Epicenter Field, a large team mascot, “Tremor” the dinosaur, was entertaining the crowd beyond third base in the “left terrace” section of the stadium.¹⁴² The tail of the mascot bumped the plaintiff, Lowe, several times from behind.¹⁴³ This caused Lowe to look over his right shoulder, distracting him from the game in progress.¹⁴⁴ As the plaintiff began to look back towards the field a foul ball struck him on the left side of the face, breaking several bones.¹⁴⁵ The defendants attempted to use the decade-old “traditional” defense that the Epicenter had screened seats available and that Lowe chose to sit in an unprotected seat; thus, the plaintiff “assumed the risk of being hit by a foul ball.”¹⁴⁶ The California Court of Appeal stated that normally a stadium owner has no duty to protect a participant from inherent risks.¹⁴⁷ Using *Knight v. Jewett*,¹⁴⁸ the court ruled that under primary assumption of risk, land owners have a duty not to increase the inherent risks to which baseball spectators assume and are regularly exposed to.¹⁴⁹ The court of appeals stated that “foul balls [are] an inherent risk to spectators [at] baseball games[;]”¹⁵⁰ if foul balls were eliminated the game of baseball would not be the same.¹⁵¹

137. Kozlowski, *supra* note 70, at paras. 7-13.

138. *Id.*

139. *Id.* at para. 24 (citing *City of Milton*, 514 So. 2d 1116).

140. 65 Cal. Rptr. 2d 105 (Cal. Ct. App. 1997).

141. *Id.*

142. *Id.* at 106.

143. *Id.*

144. *Id.*

145. *Lowe*, 65 Cal. Rptr. 2d at 106.

146. *Id.*; see also Ralph Curtis, *Assuming Risks at a Baseball Game*, available at <http://www.curtis-arata.com/winart/rsc0037.html> (last visited Sept. 29, 2002).

147. *Lowe*, 65 Cal. Rptr. 2d at 105.

148. 834 P.2d 696 (Cal. 1992).

149. *Lowe*, 65 Cal. Rptr. 2d at 106 (emphasis omitted) (citing *Knight*, 834 P.2d 696).

150. *Id.* at 111.

151. *Id.*

However, when viewing *Knight*, the same could not be said for a mascot.¹⁵² In fact, during a deposition, the individual dressed up as Tremor stated that he had missed several games during the 1994 season and the games progressed uninhibited.¹⁵³ Therefore, the California Court of Appeal reversed the lower court's decision to grant summary judgment.¹⁵⁴ The court held that the antics of the mascot were a marketing tool and were not essential to the game of baseball.¹⁵⁵ Whether the antics of the mascot could increase the inherent risks for a spectator was an "issue of fact to be resolved at trial."¹⁵⁶

The appellate court's decision was based in part on the fact that "mascots are needed to make money . . . but are not essential to the baseball game."¹⁵⁷ Since a mascot is not integral to the game, by introducing the mascot into the stands the team was in fact changing the viewing environment (increasing the inherent risk to fans) and creating a distraction that does not benefit the "game" itself.¹⁵⁸ The court even pointed out that the mascot could have been on the sidelines and avoided contact with the fans and this accident could have been completely avoided because the fan would not have been distracted from the "playing field."¹⁵⁹

Other cases or incidents have produced similar results. One such case involved a young boy who was hit by a foul ball at a Florida Marlins' pre-game batting practice.¹⁶⁰ He was by the bullpen with a group of other children as part of a special promotion.¹⁶¹ His attorney successfully argued that the pre-game program was "incidental to the game, diverted his attention [from the field], and should not have taken place during batting practice."¹⁶² The decision was appealed to the Court of Appeal of Florida, Fourth District, where the court in *South Florida Stadium Corp. v. Klein*¹⁶³ affirmed the lower court's verdict.¹⁶⁴

152. *Id.* at 111-12.

153. *Id.* at 109.

154. *Lowe*, 65 Cal. Rptr. 2d at 112.

155. *Id.* at 111.

156. *Id.*

157. *Id.* at 108.

158. *Id.* at 111.

159. *Lowe*, 59 Cal. Rptr. 2d at 109.

160. *Boy Injured by Batted Ball Wins \$1 Million from Marlins, Stadium*, ASSOCIATED PRESS STATE & LOCAL WIRE, Apr. 6, 2000; see also Charles Elmore, *Boy Hit by Foul Ball Awarded \$1 Million*, PALM BEACH POST, Apr. 6, 2000, at 6C.

161. *Boy Injured*, *supra* note 160.

162. *Id.*

163. 789 So. 2d 1002 (Fla. Dist. Ct. App. 2001) (unpublished table decision).

164. *Id.*

An injured spectator, such as one having his view blocked by a foam finger, hat, or other object, could raise numerous additional claims. If the plaintiff cannot clearly see the field, due to no fault of his own, can he still assume the risk? Another potential concern entails individuals moving down to the unprotected area by the dugouts in order to participate in between-innings promotional events. If a fan was asked to move from a protected seat down to an unprotected seat, he might have a valid distraction claim since he would not have moved but for the team asking him to help entertain other spectators. These concerns are addressed more thoroughly below when analyzing the distraction theory, which forms the basis of current claims and cases such as *Lowe*.

The *Broxson* case poses similar questions to those established by the *Coronel* and *Gunther* cases, and bears further scrutiny. Vendors, mascots, and merchandise “hawkers” are constantly diverting the attention of spectators away from the field of play.¹⁶⁵ The purchasing and consuming of these goods may cause a fan to forget the existence of the dangers from foul balls.¹⁶⁶ In addition, these products and miscellaneous scoreboard information may actually divert a spectator’s attention from the field of play, thus preventing him from focusing on the danger from foul balls.¹⁶⁷ Would these distractions increase the stadium owner’s duty of reasonable care to warn spectators about foul balls? Or, as in *Lowe*, would these risks be found to be “non-inherent” and actually *increase* the normal inherent risks? The remainder of this article highlights specific concerns that might affect future foul ball cases.

V. VIEWING PATTERNS

As highlighted earlier, court opinions most often cited as precedent are often over fifty years old. For example, in the recently published case *Benejam v. Detroit Tigers, Inc.*,¹⁶⁸ the court referenced precedent from several more recent cases and then cases from 1961, 1953, 1951, 1950, 1931, 1914, and 1908.¹⁶⁹ While precedence is critical in common law, the beauty of common law is the ability to adapt to the times. Sport viewership has significantly changed over the years, but most courts have yet to embrace this change.

Pictures from the 1920s-1960s showed fans in their suits, sitting

165. James C. Kozlowski, *Adequacy of Spectator Protection in Danger Zone: A Jury Issue*, NRPA L. REV. (May 1993), <http://classweb.gmu.edu/jkozlow/coronel.htm>.

166. *Id.*

167. *Id.*

168. 635 N.W.2d 219 (Mich. Ct. App. 2001), *appeal denied*, 645 N.W.2d 664 (Mich. 2002).

169. *Id.* at 221 n.6.

complacently, and watching a game. With expensive luxury suites, kids-only areas, club seats immediately behind home plate, swimming pools in the outfield, and a host of other viewing options, the entire viewing and fan appearance has undergone significant change. Fans come in numerous shapes, sizes, outfits, and mannerisms. Fan-watching is one of the entertaining aspects of the event attendance experience.¹⁷⁰ Fans are enthralled by a comprehensive experience ranging from doing the wave, to between innings games, to watching other distractions. The potential problem with all these activities is that by watching all these visual stimuli, a spectator might not be able to fully concentrate on the game. While fans of yesteryear could be held responsible for their own assumption of risk associated with being hit by a projectile leaving the field, such a finding was predicated on the fact that the injured fan was watching the game rather than turning his attention away from the game.

If a fan was watching a blimp rather than the game, the distraction would be self-initiated since the blimp was not necessarily initiated by the team, but possibly by an advertiser. A murkier case would exist if the fan was injured while reading the game program, the sale of which benefited the team, because fans do not necessarily need to read the program at the game. A different result occurs if the team utilizes a marketing instrumentality that intentionally or indirectly distracts the fan. Thus, in *Kozera v. Town of Hamburg*,¹⁷¹ the court concluded that a spectator assumes the risk inherent to the baseball game "so long as those risks are not unduly enhanced by the owner of the ball park."¹⁷² This concept has been referred to in other cases as the "distraction theory."

The "distraction theory" has been applied in prior cases such as *Brown v. San Francisco Ball Club, Inc.*,¹⁷³ where the court held that "a spectator . . . subjects himself to certain risks necessarily and usually incident to and inherent in the game . . ."¹⁷⁴ Thus, it has been held that a spectator might not know that there is a risk of being knocked over by fans scrambling for a foul ball, since this is not an inherent risk in the game of baseball, and it is not common knowledge that these injuries occur, especially if no one had previously been injured in that manner.¹⁷⁵ Just because an element is new or

170. BERNARD J. MULLIN ET AL., *SPORTS MARKETING* 58 (2d ed. 2000).

171. 337 N.Y.S.2d 761 (N.Y. App. Div. 1972).

172. *Id.* at 762 (citing *Ingersoll v. Onondaga Hockey Club*, 281 N.Y.S. 505 (N.Y. App. Div. 1935)).

173. 222 P.2d 19 (Cal. Dist. Ct. App. 1950).

174. *Id.* at 20; *see also* *Hunt v. Thomasville Baseball Co.*, 56 S.E.2d 828 (Ga. Ct. App. 1949); *Neinstein v. L.A. Dodgers, Inc.*, 229 Cal. Rptr. 612 (Ct. App. 1986).

175. *Lee v. Nat'l League Baseball Club of Milwaukee, Inc.*, 89 N.W.2d 811, 813 (Wis. 1958).

unknown does not immediately obviate the limited duty rule. In several cases in the 1930s and 1940s, courts held that night baseball games under the lights did not represent an extraordinary hazard, as the lighting does not materially alter the game, even though it might require additional vigilance compared with day games.¹⁷⁶ Thus, the courts appear to examine whether extemporaneous activities outside the inherent activities of a baseball game affect a spectator's ability to assume the risk of injury from foul balls.

VI. FAN MARKETING

Numerous distractions inherent in the entire baseball "event" experience are developed, initiated, and deployed by the team. The team utilizes such efforts to entertain the spectator, enhance the viewing experience, and generate additional revenue. While these elements are not technically necessary for the game, they enhance the game experience from a marketing perspective. In sports marketing circles the technique is called the sizzle. The game itself is the steak (core element), and all the ancillary activities (extended elements) are the sizzle that make the steak that much more enjoyable.¹⁷⁷

The sizzle has increased in intensity as teams maneuver through the clutter of entertainment events to attract a spectator's dollars.¹⁷⁸ As stated by one assistant general manager for a minor league team: "Baseball is secondary; entertainment is number one."¹⁷⁹ Another executive echoed those sentiments by stating that: "[W]e don't target them [baseball fans]—we market to those who may have no interest in the game and hope they have such a great time that they'll become baseball fans."¹⁸⁰

Based in part on a 1989 Professional Baseball Agreement that set forth minimum facility standards for ballparks, major and minor league parks are being rebuilt to accommodate a more family friendly atmosphere.¹⁸¹ This atmosphere can be created with such amenities as picnic areas or playgrounds designed so parents can watch both their kids and the game at the same

176. See generally James L. Rigelhaupt, Jr., Annotation, *Liability to Spectator at Baseball Game Who is Hit by or Injured as a Result of Other Hazard of Game*, 91 A.L.R.3d 24, 38 (1979) (citing *Hummel v. Columbus Baseball Club, Inc.*, 49 N.E.2d 773 (Ohio Ct. App. 1943)). The A.L.R. specifically encourages counsel for spectators "to look for unusual or noncustomary activities surrounding the circumstances of [plaintiff's injuries]." *Id.* at 38.

177. See generally Kelli Anderson, *Not So Minor Attractions*, RECREATION MGMT., Mar. 2002, at 34-41.

178. *Id.*

179. *Id.* at 36.

180. *Id.* at 37.

181. *Id.* at 38.

time.¹⁸² These and other areas are often referred to as “alternative areas of revenue,” since they are designed to generate revenue and bring in the non-traditional fans who go for the experience, not the game.¹⁸³

The list below is a partial list of team/facility-owned or operated activities that can and do distract fans:

- video display monitors on the back of seats,
- food ordering displays attached to seat or accomplished with Palm Pilots or similar devices,¹⁸⁴
- various contests on and off the field,
- various entertainment activities such as vendors using humorous techniques to deliver food (hot dog cannons),
- outfield distractions such as hot tubs, swimming pools, carousels, trains, slides, and a host of other attractions,
- sideline barbeque areas or picnic tables where some individuals are seated with their backs to the game, and
- team mascots designed to provide strolling entertainment.

The brand-new Comerica Park in Detroit was opened in 2000 and contained the following features:

- a ten-story scoreboard, including large screen video display,
- growling mechanical tigers on the scoreboard,
- a fountain that produces a liquid fireworks-type display to changes in music and lights,
- a baseball-themed ferris wheel ride with baseball-shaped cars, and
- a carousel with tigers instead of horses.¹⁸⁵

The new minor league park in Reading, Pennsylvania, GPU Stadium, has a \$1.4 million pool pavilion with a 1000 square-foot, multi-level, heated pool, including water cannons and water falls.¹⁸⁶ The pool is part of a picnic area behind the right field fence that boasts thirty-one tables, each with their own closed-circuit television.¹⁸⁷

Thus, the “distraction theory” can rely upon all these stimuli to assert a claim that might avoid the limited duty rule that would otherwise apply to shield the baseball team or stadium. The limited duty rule can also be

182. *Id.*

183. *Id.* at 39.

184. Associated Press, *Palm Pilot Enters the Sports Arena*, CONN. POST, Oct. 1, 2000, at F5.

185. The Official Site of the Detroit Tigers, *Comerica Park: Ballpark History*, at http://tigers.mlb.com/NASApp/mlb/det/ballpark/det_ballpark_history.jsp (last visited Sept. 29, 2002).

186. Anderson, *supra* note 177, at 39-40.

187. *Id.* at 40.

challenged based on the lack of properly protected seats and the type of protection available.

VII. PREMIUM SEATS

Case law has clearly established that a baseball stadium needs to provide enough screened seats for those who might wish such protection. In *Kavafian v. Seattle Baseball Club Ass'n*,¹⁸⁸ the court concluded that when a patron "could have chosen among a number of vacant seats in the screened portion of the grandstand . . . and was injured by a ball, he cannot recover, having been negligent or having assumed the risk."¹⁸⁹ Years ago, fans could move to vacant seats behind the protective screen if they wanted that protection and a seat was available. This is not necessarily the case today, and defendant facility owners can be asked if they would allow fans to move from an unscreened seat to a protected seat, especially if there is a disparity in ticket prices.

This concern is especially acute if balls hit into the unscreened seats are traveling faster than those balls hit directly behind the screened home plate area. An expert in physics can be retained to examine the speed by which a ball might have been traveling (especially if there is television/video coverage of the incident). Traditionally, balls hit straight back are hit with the bat coming underneath the ball, which takes off some of the speed. In contrast, line drive fouls (most frequently right down the foul lines) are normally hit flush, and send the ball at a higher velocity down the lines and into the stands.¹⁹⁰ Besides the physics issue that is beyond the scope of this article, the debate about "juiced balls" is also a concern that will not be covered in this article. However, empirical or other data can be used to show that the types of balls or bats increase the potential risks compared to the equipment from before the 1960s. For example, in 1975 there were only 2698 home runs hit, while there were 5693 homers hit in 2000.¹⁹¹

A baseball stadium needs to reexamine whether enough seats are actually available in the "most dangerous" locations for those that might reasonably expect to obtain such seats. These concerns raise an issue with another marketing technique that has changed the nature of viewing habits: premium seats. Premium seating started in the late 1980s and has been implemented in

188. 181 P. 679 (Wash. 1919).

189. *Id.*

190. See generally Tom Verducci, *Safety Squeeze*, SPORTS ILLUSTRATED, Apr. 1, 2002, at 64.

191. Mark Hyman, *The Trouble With Barry*, BUS. WEEK, Oct. 15, 2001, at 100.

almost every sports facility.¹⁹² Premium seats are traditionally located in what is the most desirable location for viewing the event. In some sports this is the mid-field or mid-court section. In baseball it is right behind home plate. The areas along the first and third base lines and directly behind home plate are traditionally the area in a stadium where there exists the greatest likelihood of foul balls or thrown bats entering the stands. The area behind home plate is often the most protected, with most screened seats situated in that area.

The problem with this arrangement is that there exists an entire group of individuals who will not have access to these screened seats because the seats are usually reserved. Spectators can be precluded from these sections based on ticket price, long-term contracts to secure seat location, and event security personnel. Fan migration is a serious concern because those who pay \$100 per ticket do not want someone who pays \$10 for a ticket sitting next to them. That is one reason why ushers or security personnel often spend more time patrolling these areas compared to the "nose bleed" sections.¹⁹³ Thus, while a facility is supposed to have enough screened seats for those who might reasonably be expected to request them, especially in the most dangerous areas, the individuals who might want such protection may have a hard time in fact obtaining such a seat without paying a significantly higher price. The type of seat made available can also produce a liability concern.

In addition, a plaintiff should examine the number of available seats in the stadium, the number that are screened, the number and location of injuries, the prices of seats around the lower bowl (closest to the field), and the number of seats not available to everyday fans due to pre-existing ticket contracts. Another potential concern could entail whether enough screened seats exist for disabled fans or if the accommodation seating areas are all unprotected sections. These facts can help determine whether enough seats are available for fans in the most dangerous area of the stadium.

VIII. SAFETY SOLUTIONS

Screening has changed from the hemp woven screens utilized years ago to screens made with lightweight polymers that are much thinner than the gauges used in the past, with a longer life and stronger tensile.¹⁹⁴ For example, one company—Stan Mar—offers several types of nets, mainly nylon nets of different sizes dipped in UV protectant. The netting is very strong and was

192. PETER FARMER ET AL., *SPORT FACILITY PLANNING AND MANAGEMENT* 29 (1996); *see also* E.M. Swift, *Hey, Fans: Sit on It!*, *SPORTS ILLUSTRATED*, May 15, 2000, at 70-85.

193. *See generally* FARMER, *supra* note 192.

194. Interview with Dave Benn, Vice President of Sales, Stan Mar Sports Nets (Jan. 10, 2001).

tested in 2000 when an intoxicated fan in Comiskey Park fell and landed on the net above the plate. The netting held his 200-plus pound body and he was safely removed.¹⁹⁵ These nets have been installed in ten Major League and fifteen college/minor league stadiums.¹⁹⁶

Stan Mar's Vice President of Sales estimated that most facilities run the net twenty to thirty feet high and normally end the nets at the start of the dugouts.¹⁹⁷ Some fields place their nets in a position where the protection ends at a spot where the first and third base lines would, if possible, extend into the stands. This location scheme was highlighted in a major exposé, but the article and diagrams went on to show that this area was *not* the most dangerous.¹⁹⁸ Rather, the most dangerous areas were down the first and third baselines for a significant distance past the dugouts.¹⁹⁹

Screen standardization is difficult due to the fact that almost every field is different in terms of the seating configuration, or the distance the stands are from the field. However, the American Society for Testing and Materials (ASTM) has established a standard guideline for ballfield fences that requires:

6.5.1 *Height*—The top of the fence shall be a minimum of 8 ft, 0 in. (2.44m) above grade or a greater dimension that ensures protection of spectators from a fouled line drive or related trajectory.

6.7.4 The backstop height and width may vary depending on the type of ball being played, the size and height of the spectator area around it The minimum width of the panels is dependent upon the structural design supporting the chain-link or net fabric.

7.3 *Spectator Protective Fence*—The spectator fence shall be located where spectators will congregate to watch the game or in front of bleachers of an 8 ft height or of a sufficient height to protect spectators at the highest point of the bleachers.²⁰⁰

Very few stadiums meet this height requirement, especially in any grandstand areas that extend beyond the dugouts. However, some fields also run the net three to five feet above the dugout and then end all their screening.²⁰¹ The lack of sufficient screening was identified in one case where

195. *Id.*

196. *Id.*

197. *Id.*

198. Verducci, *supra* note 190, at 65.

199. *Id.*

200. AM. SOCIETY FOR TESTING AND MATERIALS, *Standard Guide for Fences for Ballfields and Other Sports Facilities*, F-2000-00a (2000).

201. Benn, *supra* note 194.

former California Angels' pitcher Matt Keough was hit by a ball while in his team's Scottsdale Stadium dugout.²⁰² The suit was settled out of court, and one month after the accident, netting was placed at the top of the dugout to protect fans and the screen behind home plate was increased from seventeen feet to twenty-six feet.²⁰³ A similar incident occurred when New York Yankees bench coach Don Zimmer had his ear and left jaw cut after being hit by a foul ball while sitting in the dugout. This prompted Zimmer to jokingly wear a "military helmet with the Yankees logo" the next day.²⁰⁴

Besides height, screen length is an important consideration to determine sufficiency. In addition to the standard calculation of the percentage of seats behind the backstop and the expected percentage of fans who might want to have such protection, the screen length should be examined. Major League Baseball fields average from 50 feet of protection to 250 feet. However, the Oakland Coliseum has only forty-seven feet of screening.²⁰⁵ Some fields try to add an even greater amount of protection. Florida State University installed 275 feet of netting to protect fans.²⁰⁶

IX. CONCLUSION

As noted by the various courts in numerous cases, the owner of a baseball field does not insure the safety of spectators. On the contrary, the owner only owes a duty of reasonable care to prevent spectator injury.²⁰⁷ Spectators accept the inherent dangers involved in a sporting event and assume the risk of injury as long as the risks are obvious.²⁰⁸ Facility owners are only required to have screening in the area where the danger is the greatest, located behind home plate.²⁰⁹ Also, there must be screening extended to locations for the number of spectators who may request such specific seating for an ordinary game.²¹⁰ Facility managers and owners are not required to screen the entire field in order to offer a duty of reasonable care. In fact, many patrons

202. See Verducci, *supra* note 190, at 65.

203. Judi Villa, *1992 Foul-Ball Lawsuit Settled Scottsdale Stadium Injury Ended Career of Pitcher Keough*, ARIZ. REPUBLIC/THE PHOENIX GAZETTE, Feb. 16, 1996, at 3.

204. See Ronald Blum, *Lasorda Hit By Broken Bat*, (July 10, 2001), available at <http://sportserver.com/spec/bbo/01allstar/story/40943p-645864c.html> (last visited Sept. 29, 2002).

205. See *supra* note 194.

206. FLORIDA STATE UNIVERSITY, DICK HOWSER STADIUM PROGRAM (2000-01).

207. See generally *Crane*, 153 S.W. 1076; *Edling*, 168 S. W. 908; *Quinn*, 46 P.2d 144; *Yates*, 595 N.E.2d 570.

208. See generally *Akins*, 424 N.E.2d 531.

209. *Id.*; see also *Coronel*, 1991 Ill. App. LEXIS 1949.

210. See generally *Quinn*, 46 P.2d 144; *Lawson*, 901 P.2d 1013; *Swagger*, 379 N.W.2d 183.

attending a baseball game prefer to sit in sections where no screen obscures the view.²¹¹ With the change in case law from such cases as *Lowe*, the opportunity exists to leverage the changes in the game to avoid the limited duty rule.

While numerous attorneys have stayed away from spectator injury cases for fear of running afoul of the limited duty or assumption of risk doctrines, there might exist some opportunities to get around these hurdles. If an attorney can uncover significant activities designed to distract fans, fans had limited or no choice in obtaining protected seats, and that safer screening options are available, there is a possibility that we will see more opportunities for settlement, or cases being allowed to go the jury.

211. See generally *Wells*, 142 N.W. 706; *Bellezzo*, 851 P.2d 847.